

by the plaintiffs to the defendants be refunded with interest at the rate of 8% and costs. The interest is, as agreed by the parties, to take effect from 3 January 1991 to date of realisation.

It is also ordered that the plaintiffs be entitled to damages on account of the non fulfillment of the agreement, the amount of such damages to be assessed by the senior assistant registrar.

Other consequential orders are granted as prayed.

a LEE GA CREDIT & LEASING SDN. BHD.

v.

MAISAH BINTI HAJI MANSOR & 2 ORS.

HIGH COURT BORNEO, SIBU

TUAN STEVE L.K. SHIM J.

b [ORIGINATING MOTION NO. 2 OF 1992]
2 JULY 1993

c *LAND LAW: Registered chargee applying for removal of caveats lodged against land - Application made under s. 177(1) of the Sarawak Land Code - Land sold by public auction - Whether applicant has the locus standi to make the application - Caveats lodged based on agreement by chargor to retransfer property to respondents - Agreement signed after execution of memorandum of charge - Existence of no dealing clause in memorandum of charge - Whether applicant had consented to the retransfer - Whether applicants charge was indefeasible - Consideration of s. 132 of the Sarawak Land Code - Whether charge ranking in priority over the caveats.*

e The applicant, the registered chargee of a piece of land (the land), applied for the removal of a caveat lodged by the third respondent. The applicant had applied for an order for sale and was the successful bidder at the third auction sale. By way of preliminary objection, the respondents contended that the applicant's *locus standi* to make the application for the removal of the caveats had dissipated by reason of the public auction as the applicant could no longer be considered a registered proprietor or any person having a registered estate or interest in the estate or interest against which a caveat is lodged.

f On the substantive application, the third respondent contended that the memoranda of transfer in favour of the chargor was effected as a result of fraudulent representations made to her by the chargor. In this regard the third respondent alleged to the effect that she was under the impression that she was signing a development agreement when in fact it was a sale and purchase agreement. The third respondent subsequently, upon discovering the charge on the land, caused the caveat to be entered on the land relying on an agreement, made between her and the chargor, to retransfer the land to her. This agreement was executed subsequent to the creation of the charge.

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**Lee Ga Credit & Leasing Sdn. Bhd. v.
Maisah Binti Haji Mansor & 2 Ors.**

[1994] 3 CLJ

Steve L.K. Shim J.

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Held:

[1] In a situation where charged land has been sold by public auction under a Court order obtained by a registered chargee, it is necessary for the chargee to apply to the Court for various orders including an order for the discharge of the charge over the land. In the present case, the charge on the land previously executed in favour of the applicant has not yet been discharged and no application for its discharge has been made.

[2] In the circumstances, the applicant still remains the registered chargee of the land and thus in the position of a registered proprietor of an interest therein. That being the position, the applicant has the *locus standi* to make the application for the removal of the caveat and the respondents preliminary objection must necessarily fail.

[3] From the affidavits and documents filed, it was clear that the third respondent's allegations of fraud were directed towards the chargor. There is not a *scintilla* of evidence that the applicant knew or ought to have known of the alleged fraudulent representations. In the circumstances the applicant was perfectly entitled to regard the chargor as a *bona fide* registered proprietor of the land in question.

[4] There is a firm and specific prohibition in the memorandum of charge against any dealing being registered by the chargor during the currency or subsistence of the charge unless consent is given by the chargee. No such consent was given by the chargee to the chargor and as such the agreement to retransfer the land to the third respondent could not be registered.

[5] Further, the charge executed by the chargor in favour of the applicant was the first in time as compared to the caveats lodged by the respondents. The supplementary agreement and the unregistered memorandum of transfer upon which the third respondent's claim to a caveatable interest is based, were clearly made subsequent to the creation or execution of the charge in question. In the premises, the dictum of Gill CJ in *Macon Engineers* that estates and interests primarily rank in the order of creation would clearly apply in favour of the applicant.

[6] There are no serious questions to be tried as between the applicant and the third respondent. No balance of convenience in favour of the third respondent has been shown. The third respondent's remedy, if any, may well lie against the chargor.

a [7] There is no doubt that the applicant is the first and only chargee of the land. As such it has an indefeasible title to the land. The registered charge of the applicant is also ranked in priority over the caveats lodged by the respondents. In the premises, the applicant is entitled to have the said caveats removed.

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[Application allowed with costs. Caveats ordered to be removed].

Cases referred to:

Taylor v. The Land Mortgage Bank of Victoria Ltd.
[1886] VLR 748 (**fol**)

c *Mohd. bin Oki & Anor. v. Lau Hieng Ming & Ors.* [1981] 2 MLJ 88 (**refd**)

Hajah Rajiah bte. Man v. Tai Chang Finance Bhd.
[1987] 2 CLJ 154 (**refd**)

Malayan United Finance Bhd. v. Tay Lay Soon [1990] SCR 105 (**fol**)

Macon Engineers Sdn. Bhd. v. Goh Hooi Yin [1976] 2 MLJ 53 (**fol**)

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Legislation referred to:

Sarawak Land Code, ss. 32, 112, 113, 115, 132, 177(1)

For the applicant - Chamba Lindong; M/s. Lau & Company

For the respondents - Raynold Gaik; M/s. Raymond Lam & Associates

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JUDGMENT

Steve L.K. Shim J:

Lee Ga Credit and Leasing Sdn. Bhd., the applicant, is the registered chargee of the land described as Lot 114, Bekenu Town District, containing an area of 1.0765 hectares, more or less and situate at Bekenu, Sibuti, (hereinafter called the "said land"). By notice of originating motion, the applicant has applied to the Court under s. 177(1) of the Sarawak Land Code for the removal of caveats lodged by the respondents and registered with the Miri Land Registry as Instrument Nos. L. 621/1984 and L. 775/1984. Although the said caveats were lodged by M/s Raymond Lam & Associates, solicitors acting on behalf of the respondents, the present application for removal is actually directed at the caveats lodged in relation to the parcel of land described above, namely, lot 114 to which only the 3rd respondent has laid claim.

The affidavits filed by the applicant disclose the following factual situation: that on 15 November 1984, a memorandum of charge was executed by Lau Pang Keng Housing Development Sdn. Bhd. (hereinafter called "the

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Company") in favour of the applicant as security for the repayment of the loan amounting to RM120,000 advanced by the latter to the former; that when the company defaulted in the repayment of the said loan, the applicant took foreclosure proceedings against the said land; that an order for the sale was then granted by the Court for the auction sale of the land; that after 2 unsuccessful auctions, the said land was successfully sold to the applicant for the sum of RM86,100 which sum was duly paid into Court; that since the said land could not be registered to the applicant as the *bona fide* purchaser because of the existence of the caveats lodged by the respondents, the applicant in its capacity as a registered chargee as well as the successful bidder at the auction sale of the said land, had therefore applied to the Court for the removal of the said caveats under s. 177(1) of the Land Code.

At the onset, I should perhaps deal with a preliminary issue raised by Mr. Raynold Gaik, Counsel for the respondents. He has submitted, in substance, that although the applicant has the *locus standi* to make this application under s. 177(1) as a registered chargee of the said land, such *locus standi* has dissipated (as it were) by reason of the public auction sale of the land when it (the applicant) became the successful bidder thereof and can therefore no longer be considered a registered proprietor or any person having a registered estate or interest in the estate or interest against which a caveat is lodged. In this connection, I think the Australian case of *Taylor v. The Land Mortgage Bank of Victoria Ltd.* [1886] VLR 748 may provide some revelation. In that case, the defendant was the registered owner of a piece of land and he contracted to sell a portion thereof to the plaintiff. However, a third party had lodged a caveat over the land. Transfer of the said land could not be effected unless the caveat was removed. The issue before the Court was who should have the duty to remove the said caveat. The Court was of the view that the duty fell on the defendant registered owner. This is reflected in the following passage of Webb, J's judgment:

A caveat so lodged must be regarded as an incumbrance or blot on the title which it is the duty of the vendor to remove ...

But under the statute, s. 58, the registration and not the execution of the transfer, divests the estate. Until then, the estate and interest of the proprietor remain in him, and until then

a the proprietor has not done all that is necessary to divest the estate out of himself and vest it in the transferee.

b Now, in a situation where charged land has been sold by public auction under a Court order obtained by a registered chargee, as in this case, it is necessary for the chargee to apply to the Court for the following orders, namely, for the payment out of the proceeds of sale; for the execution of a memorandum of transfer of the land by the Senior Assistant Registrar on behalf of the landowner in favour of the successful bidder; for the discharge of the charge over the land as well as for the removal of all caveats in appropriate cases and for the release and delivery of the relevant document of title to the successful bidder. Here, although the said land has been auctioned off at the price of RM86,100 to the applicant, the successful bidder, the charge on the land previously executed in favour of the applicant has as yet not been discharged. No application in the nature which I have described above has been made. In the circumstances, the applicant, notwithstanding the success of the auction sale, would still remain the registered chargee of the said land and thus in the position of a registered proprietor of an interest therein. It is clear in the instant case that the application is made by the applicant in its additional capacity as the registered chargee of the land. That being the position, it has, in my view, *locus standi* to make this application.

f The 3rd respondent has alleged that she entered into a sale & purchase agreement dated 23 March 1984 (exhibit LT12) with the company in respect of the said land apparently under the misguided impression that it was a development agreement which merely allowed the company to construct a residential house for her in return for a portion of her land in lot 114. According to her, as she was illiterate and unadvised, she was therefore unaware of the nature, contents and effects of the said agreement. However, there is evidence to show that the land in question was sold by the 3rd respondent to the company subsequent to the alleged sale & purchase agreement. Such conduct on her part would tend to suggest that even if she was unaware of the nature, she must reasonably be taken to have knowledge thereof very shortly after its execution otherwise she could not conceivably have proceeded to execute the two memoranda of transfer transferring the said land to the company. The two memoranda

of transfer were apparently executed on 16 April 1984 and 21 April 1984 respectively as instrument Nos. L. 2012/1984 and L. 2015/1984 respectively: see exhibits LT4 and LT5. In the circumstances, her plea of ignorance or absence of knowledge of the nature, contents and effects of the sale & purchase agreement (exhibit LT12) can have little if any probative value. Her credibility on this score is therefore doubtful.

Be that as it may, the implication arising from the 3rd respondent's allegations is sufficiently clear, namely, that the memoranda of transfer exhibits LT4 and LT5 in respect of the said land, were effected as a result of fraudulent representations made to her by the company. However, this accusation is clearly directed at the company and not at the applicant, the chargee, in this case. The same stand is reverberated in the submission of Mr. Raynold Gaik for the 3rd respondent and is further reinforced in the draft statement of claim exhibit LT26 annexed to the affidavit in opposition. It is perhaps pertinent to note that in none of these documents including the affidavits filed by the 3rd respondent, can anything be deduced or construed as indicating or suggesting that there was fraud or fraudulent conduct on the part of the applicant or that it was a party or privy to the fraudulent representations alleged to have been made by the company to the 3rd respondent at all material times. Indeed, there is not a *scintilla* of evidence that the applicant, as the registered chargee, even knew or ought to have known of the alleged fraudulent representations. In the circumstances, as far as the applicant was concerned, it was perfectly entitled, in my view, to regard the company as a *bona fide* registered proprietor of the land in question and on that basis, to agree to advance the loan of RM120,000 to the company upon the latter executing a memorandum of charge on the said land in favour of the former. This memorandum of charge exhibit LT16 was registered on 17 November 1984 as Instrument No. L. 5790/1984. I should mention here that despite the fact that the sale & purchase agreement exhibit LT12 made between the 3rd respondent as the purchaser and the company as the vendor had been registered with the District Office, Miri, on 3 April 1984 as Deed No. 1642/84, the 3rd respondent apparently made no effort at all to caveat the land. The same would apply to the other respondents with regard to their respective sale & purchase agreements, exhibits LT13 and LT14. Perhaps the 3rd

a respondent did not think it was necessary since shortly thereafter on 16 April 1984 and 21 April 1984, she had executed two memoranda of transfer exhibits LT4 & LT5 transferring the said land to the company. In any event, she decided to lodge caveats on the land much later and only subsequent to the execution or creation of the memorandum of charge exhibit LT16. This was done, according to her, when she discovered the existence of the charge on the said land and the caveats were made, as I have stated, under and by virtue of the supplementary agreement exhibit LT3 and the consequent unregistered memorandum of transfer exhibit LT19.

In this case, s. 177(1) of the Sarawak Land Code under which this application is made, provides in effect that any registered proprietor or any other person having a registered estate or interest in the estate or interest against which the caveat has been lodged, may at any time, apply to the High Court for an order that the caveat be removed. In this respect, the necessary onus and standard of proof had been restated by Tan Chiaw Thong, J. in *Mohd. bin Oki & Anor. v. Lau Hieng Ming & Ors.* [1981] 2 MLJ 88 wherein he said *inter alia*:

At the outset, I shall deal with the onus and standard of proof. It seems clear on the authorities of *Nanyang Development [1966] Sdn. Bhd. v. How Swee Poh* and the Privy Council case of *Eng Mee Yong & Ors. v. Letchumanan* that in an application made under s. 177 of the Land Code for the removal of a caveat, where such an application is made by a registered proprietor or coproprietors of land under the Land Code, the onus is upon the caveator to satisfy the Court that he has a caveatable interest in the said land or in the respective shares of the coproprietors of the said land. As regards the standard of proof, it is clear from *Eng Mee Yong's* case that the onus is upon the caveator to satisfy the Court that on the evidence presented to it, his claim to an interest in the property caveated does raise a serious question to be tried; and having done so, he must go on to show that on the balance of convenience, it would be better to maintain the *status quo*.

It is not in dispute that the applicant in the instant case is a registered chargee of the land in question i.e. Lot 114 and thus in the position of a registered proprietor of an interest therein: see ss. 113 and 115 of the Code. As such, it would have a registered title to rely on as *prima facie* evidence of its right to the land: see *Hajah*

Rajiah bte. Man v. Tai Chang Finance Bhd. [1987] 2 CLJ 154. Here, as I have mentioned earlier, the 3rd respondent had lodged the two caveats against the said land under and by virtue of the supplementary agreement exhibit LT3 and the unregistered memorandum of Transfer exhibit LT19. It seems clear that these are essentially the documents on which she has based her claim to a caveatable interest against the said land and not on the sale & purchase agreement exhibit LT12 which the 3rd respondent purportedly thought to be in the nature of a development agreement. This is reflected in her affidavit in opposition, in particular paragraphs 14, 15 and 16 therein. However, the 3rd respondent's claim has to be examined in the light of two factors which I shall now deal with.

First, there is the existence of a no dealing clause stipulated in the memorandum of charge exhibit LT16 and that no consent was ever given by the applicant to the company to transfer or retransfer the said land to the 3rd respondent. The relevant part of exhibit LT16 states thus:

And we, Lau Pang Keng Housing Development Company Sdn. Bhd., the chargors and we, Lee Ga Credit & Leasing Sdn. Bhd., the chargees hereby agree that during the period of this charge no dealing shall be registered against the said property unless the chargees have given their consent to such registration.

The above condition is clear and precise. There is a firm and specific prohibition against any dealing being registered by the company chargor during the currency or subsistence of the charge unless consent is given by the chargee who is the applicant in this case. No such consent has been given by the chargee to the chargor to transfer or re-transfer the said land to the 3rd respondent. Quite obviously, the supplementary agreement exhibit LT3 made on 9 February 1987 between the 3rd respondent as the transferee and the company chargor as the transferor, was effected without the consent of the applicant chargee and could not therefore be registered accordingly.

Secondly, Mr. Chambai Lindong, Counsel for the applicant has, in the course of his submission, relied on the authority of s. 132 of the Code which relates to indefeasibility of title. The said section stipulates as follows:

- (1) Subject to the provisions of this Code, the registered proprietor of any estate or interest in land to which this section applies shall,

a except in the cause of fraud, hold such estate or interest subject to the interests noted on the register but free from all other interest except:

- b* (a) the estate or interest of a proprietor included in the Register in priority to the title under or through which the first mentioned registered proprietor claims, being an estate or interest to which this section applies;
- (b) as regards any portion of land included in the issue document of title by virtue of a wrong description:

c Provided that this exception shall not apply if the registered proprietor is a purchaser in good faith and for value of the portion of land affected, or derives title through such a purchaser;

- d* (c) the implied conditions, obligations and restrictions referred to in s. 32;
- (d) the interest of a tenant in possession of land for a term not exceeding one year;
- (e) any charge affecting the land under any written law; and
- (f) any easement lawfully created and subsisting on the 1st day of January 1958, or at such later date when the estate or interest affected by such easement becomes included in the Register.

- e* (2) This section shall apply to any estate or interest in land included in the Register, other than an estate or interest included in a previous Register under the former Land Ordinance and included in the register by reason only of subsection (2) of s. 112.

f Although not cited by the parties, I think the recent Supreme Court case of *Malayan United Finance Bhd. v. Tay Lay Soon* [1990] SCR 105 is material. It was a case in relation to an application for the removal of caveats lodged by virtue of a sale & purchase agreement between the respondent and the registered proprietor which was effected subsequent to the charge executed by the registered proprietor in favour of MUI Finance, the appellant, in consideration of a loan advanced by the latter to the former. In the High Court, the application was dismissed on the ground that the respondent as caveator had satisfied the Court that both in fact and in law there were serious issues to be tried in relation to the contract of sale of the charged land and that on balance of convenience it would be better to maintain the *status quo* until the trial of the action instituted by the respondent for specific performance. The appellant appealed against

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the High Court decision. In the Supreme Court, the question of the priority and indefeasibility of the charge was considered pivotal to an application of the nature before the Court. Therein, Mohd. Jemuri SCJ (as he then was) stated *inter alia*:

What appears to have preoccupied or troubled the mind of the learned Judge which made him feel constrained to make that remark as well as those in the last two paragraphs of his judgment and dismiss the appellants' application is the decisions in *Eng Mee Yong* and *Macon Engineers* which decided that in an application for the removal of a caveat, the caveator must satisfy the Court both in fact and in law that his claim is not frivolous or vexatious and that on the balance of convenience it would be better to maintain the *status quo* until the disposal of the action. With all respect, to apply such considerations in the context of the appellants' case obscures the real and crucial issue before the High Court. The cursory disposal of the issue by merely citing the authority of *Eng Ah Mooi* does not in our view resolve the issue but rather postpone it. It may be necessary to recapitulate that as between the appellant and the respondent both in the High Court and before us the pivotal issue is the indefeasibility and priority of the charge over the caveats on the part of the appellant and the right of the respondent, in the respondent's own words, to redeem the charge on the part of the respondent.

In the event, the Supreme Court, in allowing the appeal, ordered the caveats be removed because the charge registered in favour of the appellant, the chargee, was indefeasible and ranked in priority over the caveats lodged by the respondent, the subsequent purchaser. Although the respondent caveator maintained that he had a caveatable interest in the property by virtue of the sale agreement the Supreme Court took the stand that the pivotal issue as between the appellant and the respondent, was the indefeasibility and priority of the charge over the caveats. In the course of consideration, the Supreme Court approved the dictum of Gill CJ in *Macon Engineers Sdn. Bhd. v. Goh Hooi Yin* [1976] 2 MLJ 53:

Coming now to the second question as to whether the subsequent interest of the appellants overrides the earlier right of the respondent, the basic rule at law, as in equity, is that estates and interests primarily rank in the order of creation. *Oui prior est tempore*

a *potior est jure*: he who is earlier in time is stronger in law. Where there is a system of registration of titles to land the one who succeeds in the scramble to get on the register emerges victorious.

b In the instant case, the charge executed by the company in favour of the applicant was certainly the first in time as compared to the caveats lodged by the respondents. In short, the charge was created well before the respondents lodged their caveats. The supplementary agreement exhibit LT3 and the unregistered memorandum of transfer exhibit LT19 upon which the 3rd respondent's claim to a caveatable interest is based, were clearly made subsequent to the creation or execution of the charge in question. In the premises, the dictum of Gill CJ in *Macon Engineers* would clearly apply in favour of the applicant in this case.

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d For the reason given, I am of the view and I hold that there are no serious questions to be tried as between the applicant chargee and the 3rd respondent. No balance of convenience in favour of the 3rd respondent has been shown. The 3rd respondent's remedy, if any, may well lie against the company chargor. There is no doubt that the applicant is the first and only chargee of the said land. As such it has an indefeasible title to the land. The registered charge of the applicant is also ranked in priority over the caveats lodged by the respondents. In the premises, the applicant is entitled to have the said caveats removed and I so order. Costs of this proceeding to the applicant.

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